

BEFORE THE DEPARTMENT OF LIVESTOCK
OF THE STATE OF MONTANA

In the matter of the amendment of)	NOTICE OF PROPOSED
ARM 32.8.101 and 32.8.202)	AMENDMENT
pertaining to grade A pasteurized milk)	
and time from processing that fluid)	NO PUBLIC HEARING
milk may be sold for public)	CONTEMPLATED
consumption)	

TO: All Concerned Persons

1. On April 15, 2011, the Department of Livestock proposes to amend the above-stated rules.

2. The Department of Livestock will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Livestock no later than 5:00 p.m. on April 11, 2011, to advise us of the nature of the accommodation that you need. Please contact Steve Merritt, Public Information Officer, Department of Livestock, 301 N. Roberts St., Room 235, P.O. Box 202001, Helena, MT 59620-2001; telephone: (406) 444-9431; TTD number: 1 (800) 253-4091; fax: (406) 444-2877; e-mail: smerritt@mt.gov

3. The rules as proposed to be amended in the petition presented by Core-Mark provide as follows, new matter underlined, deleted matter interlined:

32.8.101 DEFINITIONS AND ADOPTION OF GRADE A PASTEURIZED MILK ORDINANCE AND ASSOCIATED DOCUMENTS (1) through (1)(d) remain the same.

~~(e) A "sell-by" date is defined as the 12th consecutive day, never to exceed 288 hours, following pasteurization of a unit of milk.~~

(f) and (g) remain the same but are renumbered (e) and (f).

(2) through (4) remain the same.

AUTH: 81-2-102, MCA

IMP: 2-4-307, 81-2-102, MCA

32.8.202 TIME FROM PROCESSING THAT FLUID MILK MAY BE SOLD FOR PUBLIC CONSUMPTION (1) ~~When 12 days or more have passed following pasteurization of the sell-by date on~~ a unit of grade A milk has passed, there will be no quantities of that unit of milk sold or otherwise offered for public consumption.

(2) No grade A pasteurized milk may be put in any container marked with a sell-by date which ~~is more than 12 days after pasteurization of the milk for sale in Montana~~ does not reasonably protect the health and safety of Montana consumers.

(a) The Board of Livestock may, upon a finding that a specific processor's sell-by date has materially failed to protect the health and safety of Montana

consumers, provide notice to the processor of the specific facts indicating such failure and require the processor to submit a written explanation in response to such facts, which shall include the processor's description of its sell-by date determination methodology.

(b) If the Board of Livestock reasonably determines that the processor's sell-by date determination methodology does not reasonably protect the health and safety of the consumer, the Board of Livestock may require said processor to engage in product testing to determine a reasonably protective sell-by date determination methodology, and to modify accordingly the sell-by date said processor uses on its containers.

(c) During any product testing period described under (2)(b), the processor shall be required to mark all containers of grade A pasteurized milk for sale in Montana by a sell-by date which is not more than 18 days after pasteurization of the milk until such time as the Board of Livestock determines that the processor has established (or modified its sell-by date determination process to ensure) that its sell-by date determination methodology and chosen sell-by date reasonably protects Montana consumers' health and safety.

(3) Unless otherwise agreed upon, the person who offers the milk for sale to the public is responsible for removing the milk at or before the expiration of ~~the 12 days~~ the sell-by date marked on the container.

(4) No grade A pasteurized milk may be put in any container marked with more than one sell-by date unless the sell-by date for use by Montana retailers and consumers is marked as the Montana sell-by date in a manner that is reasonably clear to Montana retailers and consumers.

AUTH: 81-2-102, MCA
IMP: 81-2-102, MCA

REASONS: In the fall of 2008, the Montana Department of Livestock (department) and Core-Mark, a Washington State corporation, entered into a settlement agreement regarding an action in U.S. District Court. That action concerned the sale of out-of-state milk in Montana by Core-Mark Distributors and Montana retail sellers. Such sales were subject to ARM 32.8.202 known as the 12-day pull date rule. Core-Mark challenged the constitutionality of the Montana 12-day pull date rule.

Pursuant to the above-mentioned agreement and 2-4-315, MCA, Core-Mark presented a petition to the department that proposes new administrative rules and the repeal or amendment of present rules regarding the Montana 12-day pull date rule. The Core-Mark proposal is presented in paragraph 3 above.

The Montana Board of Livestock, as director of the department, does not propose the adoption of this proposal by Core-Mark, but pursuant to 2-4-315, MCA, has agreed to present the proposal for public comment and testimony.

The parties have agreed to proceed with the consideration of Core-Mark's Petition through the use of a combined two-part hearing under the requirements of 2-4-302 and 315, MCA. The Montana Board of Livestock (board) as the director of the

department is the decision maker on all matters. By agreement, the proposals will be given to the board for decision following the conclusion of the two-part hearing process.

This new amendment notice is necessary because the formal evidentiary hearing process has not been completed and the required extension notice was not filed in a timely manner. The original Notice No. 32-9-200 published on November 12, 2009, stated the department would use a combined two-part hearing under the requirements of 2-4-302 and 315, MCA and the notice announced the dates and times of the hearings. The first part of the combined hearing allowed for submission of evidence by designated parties in a formal setting, presided over by a hearings examiner, and governed by rules of evidence. The second part of the combined hearing, presided over by the board, presented an opportunity for members of the public to appear and present testimony regarding the proposed amendments as found in the petition submitted by Core-Mark. The second part has been completed. The first part has not been completed. After the first part has been completed, which includes the presentation of written finding of fact and conclusions of law, and legal briefing by the designated parties, the hearing examiner will be presenting to the board, a proposed decision based on the testimony and evidence received at that first part of the hearing. As noted in the original published notice on November 12, 2009, MAR Notice No. 32-9-200 at page 2095 of the 2009 Montana Administrative Register, Issue Number 21, the Board of Livestock will consider equally all testimony and comment received in both parts of the hearing, and the official record will contain all testimony and comment received in both parts of the hearing.

4. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Steve Merritt, Public Information Officer, Department of Livestock, 301 N. Roberts St., Room 235, P.O. Box 202001, Helena, MT 59620-2001; telephone: (406) 444-9431; TTD number: 1 (800) 253-4091; fax: (406) 444-2877; e-mail: smerritt@mt.gov, and must be received no later than 5:00 p.m., April 11, 2011.

5. If persons who are directly affected by the proposed action wish to express their data, views, and arguments orally or in writing at a public hearing, they must make a written request for a hearing and submit this request along with any written comments they have to the same address as above. The written request for hearing must be received no later than 5:00 p.m. April 11, 2011.

6. If the department receives requests for a public hearing on the proposed action from either 10 percent or 25, whichever is less, of the persons who are directly affected by the proposed action; from the appropriate administrative rule review committee of the Legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a public hearing will be held at a later date. Notice of the public hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected have been determined to be more than 25, based upon the population of the state.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 4 above or may be made by completing a request form at any rules hearing held by the department.

8. An electronic copy of this Proposal Notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of State strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

9. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

/s/ George H. Harris

George H. Harris
Rule Reviewer

/s/ Christian Mackay

Christian Mackay
Executive Officer
Department of Livestock

Certified to the Secretary of State February 28, 2011.